In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1397

CLEAR CREEK, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The opinion of the district court (Pet. App. A 9-11) is not reported. The opinion of the court of appeals (Pet. App. A 1-8) is reported at 420 F. 2d 1136.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1970. The petition for a writ of certiorari was filed on April 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

384-332—70

QUESTION PRESENTED

Whether a pipeline company, which had contracted to buy and distribute all oil produced from certain lands, was entitled in a condemnation proceeding to compensation for an interest in the land or merely suffered a noncompensable frustration of its business contract.

STATEMENT

The United States brought these condemnation actions to acquire fee title to five tracts for the Marion Dam and Reservoir Project on the Cottonwood River in Kansas. The declaration of taking included the following recitation:

> The estate taken for the said public uses is all right, title, and interest in and to the subsurface estate, or any interest therein, including all oil, gas and other minerals, together with all rights of ingress and egress over the surface of the land for the purpose of exploration, development, production and removal of said oil, gas and other minerals * * *.

After the government had settled with all the landowners, royalty owners and operators of two tracts, and trial on the remaining three tracts was pending, Clear Creek, Inc., a pipeline company which had been formed to operate a gathering service for the oil-producing operators in the area and had entered into a contract to buy and distribute all the oil produced from the lands taken, sought to intervene on the ground that by virtue of its irrevocable agreement to buy at least 4.5 million barrels of oil, which was frus-

trated by the government's condemnation action, it had a compensable interest in the land taken.

Over the government's objection, the district court directed the commission appointed under Rule 71A (h), F.R. Civ. P., to report on whether Clear Creek had a compensable interest in the land taken. The commission reported that Clear Creek had an interest in the land condemned that amounted to an "equitable servitude." Accordingly, the commission made an award in favor of Clear Creek over and above the amount awarded to the holders of interests in the land. The district court confirmed the commission's awards.

On the government's appeal to the United States Court of Appeals for the Tenth Circuit, the judgment was reversed. The court (Pet. A 4) held that:

> The division order contracts were not "taken" by the condemnation action. Clear Creek, vis-a-vis the contracts, had neither an interest nor an estate in the condemned land; their contracts concerned only the oil after it was severed from the reality. Appellee could not compel production, sue for waste or do any of the things incident to ownership. Their contracts were merely frustrated and the fact that they were irrevocable for a period of time does not elevate their stature to an interest or estate in the condemned fees.

The court also held that awarding Clear Creek compensation above that fixed for the owners of interests in the land taken violated the unit rule, which requires valuation of the property taken as a whole, rather than valuation of constituent elements inhering in

the property. Finally, the court held that by referring the legal issue of compensability to the commission, the district court had violated Rule 71A(h), F.R. Civ. P.

ARGUMENT

The court below properly concluded that in condemnation the Fifth Amendment requires the United States to pay only for the taking of vested property rights, not for the loss of business opportunities, which is the essence of Clear Creek's claim. In *Omnia Co.* v. *United States,* 261 U.S. 502, this Court held that the government was not liable for the frustration of a lucrative contract to purchase a large quantity of steel at a favorable price when the United States requisitioned the manufacturer's entire production for one year, stating (261 U.S. at 513), "[f]rustration and appropriation are essentially different things." So, also, in *Mitchell* v. *United States,* 267 U.S. 341, recovery was denied a canner seeking compensation for the destruction of his business when the government took the land on which he used to grow corn of a special grade and quality. And the Court has repeatedly recognized that "the existence of value alone does not generate interests protected by the Constitution against diminution by the government * * *." *Reichelderfer* v. *Quinn,* 287 U.S. 315, 319. The United States pays only for the taking of vested property rights, not for "opportunities which the owner may

lose." *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282.[1]

Every case upon which petitioner relies (here and in the court of appeals) involved the taking of a recognized property interest in land: a leasehold, *United States* v. *General Motors Corp.*, 323 U.S. 373; a lien amounting to an equitable servitude, *Adaman Mutual Water Company* v. *United States*, 278 F. 2d 842 (C.A. 9); franchises and physical assets constructed at the instance and implied invitation of Congress, *Monongahela Navigat'n Co.* v. *United States*, 148 U.S. 312;[2] a riparian owner's vested rights under state law to sand and gravel deposits in a tidal estuary, *United States* v. *Smoot Sand & Gravel Corporation*, 248 F. 2d 822 (C.A. 4); a franchise amounting under state law to a chattel real, *United States* v. *Puget Sound Power & Light Co.*, 147 F. 2d 953 (C.A. 9); a fran-

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[1] See, also, *Joslin Co.* v. *Providence*, 262 U.S. 668, 675; *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377–378; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94–95; *Bothwell* v. *United States*, 254 U.S. 231, 233; *Scully* v. *United States*, 409 F. 2d 1061, 1065 (C.A. 10), certiorari denied, 396 U.S. 876; *Mollohan* v. *Gray*, 413 F. 2d 349 (C.A. 9); *Acton* v. *United States*, 401 F. 2d 896 (C.A. 9), certiorari denied, 393 U.S. 1121, 395 U.S. 945; *United States* v. *Cox*, 190 F. 2d 293, 295–296 (C.A. 10), certiorari denied, 342 U.S. 867; *Osborne* v. *United States*, 145 F. 2d 892, 896 note 5 (C.A. 9); *Stipe* v. *United States*, 337 F. 2d 818, 821–822 (C.A. 10); *Hooten* v. *United States*, 405 F. 2d 1167 (C.A. 5); *J. A. Tobin Construction Company* v. *United States*, 343 F. 2d 422 (C.A. 10); *R. J. Widen Company* v. *United States*, 357 F. 2d 988 (C. Cls.).

[2] This Court has subsequently explained that *Monongahela* rested "primarily upon the doctrine of estoppel." *Omnia Co.* v. *United States*, 261 U.S. 502, 513–514; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281; *United States* v. *Rands*, 389 U.S. 121, 126.

chise, gas mains and services, electrical ducts, cables, and other physical facilities, *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391 (C.A. 2); and a substantial interest in real property—a terminal company's 10-year grant, with renewal option, to erect and maintain major freight-handling structures in a municipal market, *Brooklyn Eastern Dist. Terminal* v. *City of New York*, 139 F. 2d 1007 (C.A. 2), certiorari denied, 322 U.S. 747.

The decision below does not conflict with any decision of this Court or any of the courts of appeals. The United States has never been required to pay for the frustration of a contractual right or the loss of a business opportunity where the claimant failed to establish an interest or estate in the land taken.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1970.

U. S. GOVERNMENT PRINTING OFFICE: 1970